March 2003

MJI Publication Updates

Child Protective Proceedings Benchbook

Crime Victim Rights Manual

Criminal Procedure Monograph 6-Pretrial Motions

Domestic Violence Benchbook (2d ed)

Juvenile Justice Benchbook

Sexual Assault Benchbook

Traffic Benchbook-Revised Edition, Vol. 2

March 2003

Update: Child Protective Proceedings Benchbook

CHAPTER 2

Reporting & Investigation of Suspected Abuse & Neglect

2.5 Persons Required to Report Suspected Abuse or Neglect

Insert the following bullet in the bulleted list on page 2-6:

- members of the clergy; MCL 722.623, as amended by 2002 PA 693, effective March 1, 2003.

CHAPTER 11

Evidentiary Issues in Child Protective Proceedings

11.4 Abrogation of Privileges in Protective Proceedings

Replace the first paragraph under Section 11.4 with the following:

MCL 722.631, as amended by 2002 PA 693, effective March 1, 2003, provides:

> "Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]. This section does not relieve a member of the clergy from reporting suspected child abuse or child neglect under [MCL 722.623] if that member of the clergy receives information concerning suspected child abuse or neglect while acting in any other capacity listed in [MCL 722.623]."

March 2003

Update: Crime Victim Rights Manual

CHAPTER 4

Protection From Revictimization

4.12 Criminal Offenses That May Be Committed While Threatening or Intimidating a Victim

A. "Obstruction of Justice"

Insert the following language at the end of the first full paragraph in Section 4.12(A) on p 66:

> Regarding the interplay between statutory and common-law obstruction of justice, see *People v Greene*, ___ Mich App ___ (2003), where the Court of Appeals, in applying principles of statutory construction to the witness tampering statute in MCL 750.122, stated: "[A]s we examine the language used in MCL 750.122(6), we are mindful that the precise statutory description of the prohibited criminal conduct, not necessarily notions of witness tampering that existed at common law, under other statutes, or even under other subsections of MCL 750.122, guides our interpretation." *Id*. at ___. In a footnote, the Court also held that a statement made by two previous Court of Appeals opinions that "the Legislature codified the common law crime of obstruction of justice" was merely dicta and did not have the force of law because the statute was not at issue in either of those two cases. *Id*. at ___ n 6. As a result, the Court concluded: "[W]e are not persuaded that, contrary to the plain language in the statute . . ., MCL 750.122(6) [interference] follows any common law approach to obstruction of justice that would require threats, intimidation, or physical interference as elements of this offense." *Id*.

1. Statutory Offenses

Insert the following language after the last full paragraph on p 67:

For a published Michigan Court of Appeals opinion on the statutory interpretation of the witness tampering statute in MCL 750.122, and specifically subsection 6 governing "interference," see *People v Greene*, ___ Mich App ___ (2003). In this case, the defendant, who was initially charged with killing an unborn quick child after assaulting his pregnant girlfriend, was later charged with witness tampering under MCL 750.122(6) for making a three-way telephone conversation from jail between himself, an acquaintance, and his girlfriend. During this conversation, defendant's girlfriend indicated that she had received a subpoena to appear at a hearing (presumably the preliminary examination) and was fearful of the consequences of failing to appear. Defendant, although not threatening or intimidating her, dismissed her fears, telling her not to come and "just stay gone until the court closes about 5:00." He also told her that failing to appear would only result in a $150.00 fine, and that the subpoena was ineffective. In concluding that the district court properly bound defendant over for trial, the Court of Appeals found that defendant's efforts through his three-way telephone conversation created a question of fact regarding whether his conduct fit the attempt language in MCL 750.122(6). *Id*. at ___. The Court also articulated the elements of "interference" under MCL 750.122(6) as follows:

> "[T]o prove that a defendant has violated MCL 750.122(6), . . . the prosecutor must prove that the defendant (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness's ability (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding. In the last part of the definition we use the word interference to include all types of conduct proscribed in subsection 6." *Id*. at ___.

CHAPTER 8

The Crime Victim at Trial

8.6 Special Protections for Child or Developmentally Disabled Victim-Witnesses

D. Taking, Using, and Disclosing Videorecorded Statements

Insert this new subsection at the end of Section 8.6 on p 167:

Effective March 31, 2003, 2002 PA 604 amended MCL 600.2163a, and 2002 PA 625 amended MCL 712A.17b, by revising and adding new provisions on the use and disclosure limitations of videorecorded statements of witnesses. The following details the salient revisions and additions.

A "videorecorded statement," which replaces the word "videotaped statement," specifically excludes videorecorded depositions from its definition, as follows:

> "'Videorecorded statement' means a witness's statement taken by a custodian of the videorecorded statement as provided in subsection (5). Videorecorded statement does not include a videorecorded deposition taken as provided in subsections (17) and (18)." MCL 600.2163a(1)(c) and MCL 712A.17b(1)(c).

A "custodian of the videorecorded statement" means any of the following:

- The family independence agency;
- Investigating law enforcement agency;
- Prosecuting attorney;
- Department of attorney general; or
- Another person designated under the county protocols established as required by MCL 722.628. MCL 600.2163a(1)(a) and MCL 712A.17b(1)(a).

A videorecorded statement is subject to a court protective order to protect the witness's privacy if the statement becomes part of the court record. MCL 600.2163a(11) and MCL 712A.17b(10).

Unless otherwise provided in MCL 600.2163a and MCL 712A.17b, a videorecorded statement must not be copied or

reproduced in any manner and is exempt from disclosure under Michigan's Freedom of Information Act (FOIA) and under another statute or Michigan court rule governing discovery. However, the production or release of a transcript of the videorecorded statement is not prohibited. MCL 600.2163a(12) and MCL 712A.17b(11). In addition, if authorized by the prosecuting attorney in the county where the videorecorded statement was taken, "a videorecorded statement may be used for purposes of training the custodians of the videorecorded statement in that county on the forensic interview protocol implemented as required by [MCL 722.628]." MCL 600.2163a(9) and MCL 712A.17b(8).

A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of the videorecorded statement to the following entities:

- Law enforcement agency;
- An agency authorized to prosecute the criminal case; and
- An entity that is part of the county protocols established under MCL 722.628. MCL 600.2163a(8) and MCL 712A.17b(7).

In prosecutions of adult offenders, the defense has the right to view and hear a videorecorded statement before the preliminary examination, and, upon request, the prosecutor must also provide the defense with reasonable access to the videorecorded statement at a reasonable time before the defendant's pretrial or trial. MCL 600.6123a(8). Additionally, to prepare for a court proceeding, the court may order that a copy of the videorecorded statement be given to the defense under protective conditions, "including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement." *Id*. In juvenile adjudications, the defense has the right to view and hear a videorecorded statement "at a reasonable time before it is offered into evidence." MCL 712A.17b(7). Additionally, to prepare for a court proceeding, the court may order that a copy of the videorecorded statement be given to the defense under protective conditions, "including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement." *Id*.

In prosecutions of adult offenders, a videorecorded statement may be used to support "a factual basis for a no contest plea or to supplement a guilty plea," in addition to its other statutorily authorized uses, i.e., pretrial proceedings (except preliminary examinations), impeachment purposes, and sentencing purposes. MCL 600.6123a(6)(d). In juvenile proceedings, a videorecorded

statement "shall be admitted at all proceedings except the adjudication stage." MCL 712A.17b(5).

The unauthorized release or consent to release of a videorecorded statement by an individual, including, but not limited to, a custodian of the videorecorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney is a misdemeanor punishable by imprisonment for not more than 93 days or a maximum $500.00 fine, or both. MCL 600.2163a(10), (20) and MCL 712A.17b(9), (19).

CHAPTER 12

The Relationship Between Criminal or Juvenile Proceedings & Civil Actions Filed by Crime Victims

12.2 Statutes of Limitations for Tort Actions

Insert the following language at the end of the third bulleted paragraph in Section 12.2 on p 297:

> Effective March 31, 2003, 2002 PA 715 amended MCL 600.5805 by adding subparagraph (4) which establishes a five-year limitations period for assault and battery causes of action in which there is, or was, a dating relationship* between the defendant and victim. This five-year limitations period applies to any cause of action arising on or after January 1, 2003 and to any cause of action in which the limitations period in MCL 600.5805(2) (domestic assault and battery with spouse or former spouse, resident or former resident, or child in common) has not already expired as of January 1, 2003.

*A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 600.5805(15).

Insert the following language at the end of the last bulleted paragraph on p 297:

> Effective March 31, 2003, 2002 PA 715 amended MCL 600.5805 by adding subparagraph (12) which establishes a five-year limitations period for causes of action for injuries to a person or property of a domestic partner where the plaintiff has or has had a dating relationship with the defendant. This five-year limitations period applies to any cause of action arising on or after January 1, 2003 and to any cause of action in which the limitations period in MCL 600.5805(2) (domestic assault and battery with spouse or former spouse, resident or former resident, or child in common) has not already expired as of January 1, 2003.

Because of the added statutory subparagraphs and the redesignation of subsequent subparagraph numbers in MCL 600.5805, please note the following redesignated subparagraph number in the bulleted list on p 297:

- "The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." MCL 600.5805(10).

March 2003

Update: Criminal Procedure Monograph 6—Pretrial Motions

Part 2—Individual Motions

6.12 Motion to Dismiss for Delay in Arrest Resulting in Prejudice to Defendant

Insert the following language at the end of the first full paragraph on p 14:

> See also *People v Tanner*, ___ Mich App ___ (2003) (defendant's vague claims of "faded memories and lost witnesses," without a specific showing how the alleged deficiencies actually and substantially impaired her defense, held to be too speculative and insufficient to establish actual and substantial prejudice).

Insert the following language at the end of the second full paragraph on p 14:

> See also *People v Tanner*, ___ Mich App ___ (2003) (trial court did not err in finding that the five-year delay between the initial request for arrest warrant and initiation of criminal charges resulted from the police conducting further investigation and from the prosecutors being dissatisfied with the sufficiency of the evidence—two proper bases to delay prosecution).

March 2003

Update: Domestic Violence Benchbook (2d ed)

CHAPTER 5

Evidence in Criminal Domestic Violence Cases

5.10 Privileged Communications with Medical or Mental Health Service Providers

F. Clergy

Delete the last paragraph in this Section and insert the following:

This privilege is not abrogated under the Child Protection Law. See MCL 722.631, as amended by 2002 PA 693 effective March 1, 2003 and quoted at Section 5.10(G).

G. Abrogation of Privileges in Cases Involving Suspected Child Abuse or Neglect

Replace the first two paragraphs in this section with the following text:

The Child Protection Law, at MCL 722.623(1), amended by 2002 PA 693, effective March 1, 2003, imposes a duty to report suspected child abuse or neglect to the Family Independence Agency, as follows:

> "A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, certified social worker, social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the [FIA]. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act."

In conjunction with the foregoing reporting requirements, MCL 722.631 as amended by 2002 PA 693, effective March 1, 2003, provides as follows:

> "Any legally recognized privileged communication except that between attorney and client or that made to a member of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]. This section does not relieve a member of the clergy from reporting suspected child abuse or neglect under [MCL 722.623] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.623]."

March 2003

Update: Juvenile Justice Benchbook

CHAPTER 20

Imposition of Adult Sentences in Designated Cases

20.35 Imposition of Fines

Replace the second paragraph in Section 20.35, on page 20-34, with the following text:

> The maximum amount of a penal fine is usually found in the penal statute that defines the offense. If the penal statute is silent on the amount of the fine, then the maximum amount of the fine shall be $5,000.00 for a felony and $500.00 for a misdemeanor. MCL 750.503, as amended by 2002 PA 722, effective March 1, 2003 and 750.504, as amended by 2002 PA 723, effective March 1, 2003.

March 2003

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

I. "Force or Coercion"

5. Concealment or Element of Surprise

Insert the following language at the end of the Note near the top of p 74:

> Although the Legislature has not yet amended the CSC Act to explicitly criminalize sexual activity through misidentification or impersonation, it has amended, effective March 31, 2003, through 2002 PA 672, the penal code misdemeanor crime governing the wearing of masks or other devices to perpetrate crimes, which now provides as follows:
>
> > "A person who intentionally conceals his or her identity by wearing a mask or other device covering his or her face for the purpose of facilitating the commission of a crime is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both." MCL 750.396.

CHAPTER 3

Other Related Offenses

3.3 Adultery

B. Penalties

Effective March 31, 2003, 2002 PA 722 amended the maximum fine provision in MCL 750.503, the statute governing penalty provisions of felonies when not fixed by statute, from $2,000.00 to $5,000.00. The maximum imprisonment provision remains unaltered at four years. Thus, effective March 31, 2003, a violation of the adultery statute is a felony punishable by imprisonment for not more than four years or a maximum $5,000.00 fine, or both.

CHAPTER 3

Other Related Offenses

3.5 AIDS/HIV and Sexual Penetration

B. Penalties

Effective March 31, 2003, 2002 PA 722 amended the maximum fine provision in MCL 750.503, the statute governing penalty provisions of felonies when not fixed by statute, from $2,000.00 to $5,000.00. The maximum imprisonment provision remains unaltered at four years. Thus, effective March 31, 2003, a violation of the AIDS/HIV and Sexual Penetration statute is a felony punishable by imprisonment for not more than four years or a maximum $5,000.00 fine, or both.

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

A. Statutory Authority

1. Creation of Child Sexually Abusive Matter

Replace the language in Section 3.7(A)(1) at the bottom of p 131 with the following:

> Effective March 31, 2003, MCL 750.145c(2) was amended by 2002 PA 629 and now provides as follows:
>
> > "A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child."

2. Distribution or Promotion of Child Sexually Abusive Material

Replace the language in Section 3.7(A)(2) at the top of p 132 with the following:

> Effective March 31, 2003, MCL 750.145c(3) was amended by 2002 PA 629 and now provides as follows:
>
> > "A person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance,

or promote any child sexually abusive material or child sexually abusive activity is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $50,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. This subsection does not apply to the persons described in [MCL 752.367 (governing exemptions from first- and second-degree obscenity)].

3. Possession of Child Sexually Abusive Material

Replace the language in Section 3.7(A)(3) at the bottom of p 132 and the top of p 133 with the following:

Effective March 31, 2003, MCL 750.145c(4) was amended by 2002 PA 629 and now provides as follows:

"A person who knowingly possesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. This subsection does not apply to any of the following:

"(a) A person described in [MCL 752.367 (governing exemptions from first- and second-degree obscenity)] or to a commercial film or photographic print processor acting pursuant to subsection (8) [MCL 750.145c(8)].

"(b) A police officer acting within the scope of his or her duties as a police officer.

"(c) An employee or contract agent of the department of social services acting within the scope of his or her duties as an employee or contract agent.

"(d) A judicial officer or judicial employee acting within the scope of his or her duties as a judicial officer or judicial employee.

"(e) A party or witness in a criminal or civil proceeding acting within the scope of that criminal or civil proceeding.

"(f) A physician, psychologist, limited license psychologist, professional counselor, or registered nurse licensed under the public health code [MCL 333.1101-333.25211], acting within the scope of practice for which he or she is licensed.

"(g) A social worker registered in this state under article 15 of the public health code [MCL 333.16101-333.18838], acting within the scope of practice for which he or she is registered."

B. Penalties

Effective March 31, 2003, 2002 PA 629 amended the maximum penalty provisions in MCL 750.145c(4) by redesignating the offense from a misdemeanor to a felony, and authorizing imprisonment for four years and/or a $10,000.00 fine. Thus, replace the third paragraph in Section 3.7(B) with the following:

3) Possession of child sexually abusive material as described in MCL 750.145c(4) is a felony punishable by imprisonment for not more than four years or a maximum $10,000.00 fine, or both.

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

D. Relevant Statutory Terms

Effective March 31, 2003, 2002 PA 629 amended MCL 750.145c(1) by changing and adding some terms and definitions. Thus, replace the terms and definitions in Section 3.7(D) with the following:

a) "Appears to include a child" means "that the depiction appears to include, or conveys the impression that it includes, a person who is less than 18 years of age, and the depiction meets either of the following conditions:

> "(i) It was created using a depiction of any part of an actual person under the age of 18.
>
> "(ii) It was not created using a depiction of any part of an actual person under the age of 18, but all of the following apply to that depiction:
>
> > "(A) The average individual, applying contemporary community standards, would find the depiction, taken as a whole, appeals to the prurient interest.
> >
> > "(B) The reasonable person would find the depiction, taken as a whole, lacks serious literary, artistic, political, or scientific value.
> >
> > "(C) The depiction depicts or describes a listed sexual act in a patently offensive way." MCL 750.145c(1)(a).

b) "Child" means "a person who is less than 18 years of age, subject to the affirmative defense created in subsection (6) [MCL 750.145c(6)] regarding persons emancipated by operation of law." MCL 750.145c(1)(b).

c) "Child sexually abusive activity" means "a child engaging in a listed sexual act." MCL 750.145c(1)(k).

d) "Child sexually abusive material" means "any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child

engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording." MCL 750.145c(1)(*l*).

e) "Contemporary community standards" means "the customary limits of candor and decency in this state at or near the time of the alleged violation of this section." MCL 750.145c(1)(d).

f) "Prurient interest" means "a shameful or morbid interest in nudity, sex, or excretion." MCL 750.145c(1)(j).

CHAPTER 3

Other Related Offenses

3.7 Child Sexually Abusive Activity

F. Affirmative Defenses

Effective March 31, 2003, 2002 PA 629 added an affirmative defense to the crime of child sexually abusive activity, MCL 750.145c, if the child victim is emancipated. Thus, please add new Section 3.7(F), and the following language, to the end of p 137:

> MCL 750.145c(6) provides an affirmative defense to the crime of child sexually abusive activity under MCL 750.145c if "the alleged child is a person who is emancipated by operation of law under [MCL 722.4], as proven by a preponderance of the evidence."
>
> Additionally, the Legislature added a notice provision for defendants intending to offer evidence to establish that a depiction is not, in fact, an actual person under age 18. MCL 750.145c(7) provides as follows:
>
> > "If a defendant in a prosecution under this section proposes to offer in his or her defense evidence to establish that a depiction that appears to include a child was not, in fact, created using a depiction of any part of an actual person under the age of 18, *the defendant shall at the time of the arraignment on the information or within 15 days after arraignment but not less than 10 days before the trial of the case*, or at such other time as the court directs, file and serve upon the prosecuting attorney of record a notice in writing of his or her intention to offer that defense. The notice shall contain, as particularly as is known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant to establish that the depiction was not, in fact, created using a depiction of any part of an actual person under the age of 18. Failure to file a timely notice in conformance with this subsection precludes a defendant from offering this defense." [Emphasis added.]

CHAPTER 3

Other Related Offenses

3.10 Disorderly Person (Common Prostitute/Window Peeper/ Indecent or Obscene Conduct)

B. Penalties

Effective March 31, 2003, 2002 PA 723 amended the maximum fine provision in MCL 750.504, the statute governing penalty provisions of misdemeanors when not fixed by statute, from $100.00 to $500.00. The maximum imprisonment provision remains unaltered at 90 days. Thus, effective March 31, 2003, a violation of the disorderly person statute is a misdemeanor punishable by not more than 90 days in jail or a maximum $500.00 fine, or both.

CHAPTER 3
Other Related Offenses

3.16 Indecent Exposure

A. Statutory Authority and Penalties

Replace the language in Section 3.16(A) on p 160 with the following:

MCL 750.335a, as amended by 2002 PA 672, effective March 31, 2003, punishes a person who knowingly makes an open or indecent exposure of himself or herself or of another person, as follows:

> "Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another is guilty of a misdemeanor, punishable by imprisonment for not more than 1 year, or by a fine of not more than $1,000.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other provision of any other statute notwithstanding, said offense shall be triable only in a court of record."

CHAPTER 3

Other Related Offenses

3.20 Lewd and Lascivious Cohabitation/Gross Lewdness

A. Statutory Authority and Penalties

Replace the language in Section 3.20(A) on p 171 with the following:

MCL 750.335, as amended by 2002 PA 672, effective March 31, 2003, proscribes lewd and lascivious cohabitation and gross lewdness as follows:

> "Any man or woman, not being married to each other, who lewdly and lasciviously associates and cohabits together, and any man or woman, married or unmarried, who is guilty of open and gross lewdness and lascivious behavior, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00. No prosecution shall be commenced under this section after 1 year from the time of committing the offense."

CHAPTER 3
Other Related Offenses

3.23 Obstruction of Justice

B. "Testifying in Official Proceedings" Statute and Penalties

1. Statutory Authority

Insert the following language at the end of Section 3.23(B)(1) on p 177:

> For a published Michigan Court of Appeals opinion on the statutory interpretation of the witness tampering statute in MCL 750.122, and specifically subsection 6 governing "interference," see *People v Greene*, ___ Mich App ___ (2003). In this case, the defendant, who was initially charged with killing an unborn quick child after assaulting his pregnant girlfriend, was later charged with witness tampering under MCL 750.122(6) for making a three-way telephone conversation from jail between himself, an acquaintance, and his girlfriend. During this conversation, defendant's girlfriend indicated that she had received a subpoena to appear at a hearing (presumably the preliminary examination) and was fearful of the consequences of failing to appear. Defendant, although not threatening or intimidating her, dismissed her fears, telling her not to come and "just stay gone until the court closes about 5:00." He also told her that failing to appear would only result in a $150.00 fine, and that the subpoena was ineffective. In concluding that the district court properly bound defendant over for trial, the Court of Appeals found that defendant's efforts through his three-way telephone conversation created a question of fact regarding whether his conduct fit the attempt language in MCL 750.122(6). *Id*. at ___. The Court also articulated the elements of "interference" under MCL 750.122(6) as follows:
>
> > "[T]o prove that a defendant has violated MCL 750.122(6), . . . the prosecutor must prove that the defendant (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness's ability (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding. In the last part of the definition we

use the word interference to include all types of conduct proscribed in subsection 6." *Id*. at ___.

CHAPTER 3

Other Related Offenses

3.23 Obstruction of Justice

C. Common-law Obstruction of Justice

Insert the following language after the first full paragraph in Section 3.23(C):

> Regarding the interplay between statutory and common-law obstruction of justice, see *People v Greene*, ___ Mich App ___ (2003), where the Court of Appeals, in applying principles of statutory construction to the witness tampering statute in MCL 750.122, stated: "[A]s we examine the language used in MCL 750.122(6), we are mindful that the precise statutory description of the prohibited criminal conduct, not necessarily notions of witness tampering that existed at common law, under other statutes, or even under other subsections of MCL 750.122, guides our interpretation." *Id*. at ___. In a footnote, the Court also held that a statement made by two previous Court of Appeals opinions that "the Legislature codified the common law crime of obstruction of justice" was merely dicta and did not have the force of law because the statute was not at issue in either of those two cases. *Id*. at ___ n 6. As a result, the Court concluded: "[W]e are not persuaded that, contrary to the plain language in the statute . . ., MCL 750.122(6) [interference] follows any common law approach to obstruction of justice that would require threats, intimidation, or physical interference as elements of this offense." *Id*.

CHAPTER 3

Other Related Offenses

3.24 Prostitution, Soliciting and Accosting, and Pandering

A. Prostitution

2. Penalties

Effective March 31, 2003, 2002 PA 723 amended the maximum fine provision in MCL 750.504, the statute governing penalty provisions of misdemeanors when not fixed by statute, from $100.00 to $500.00. The maximum imprisonment provision remains unaltered at 90 days. Thus, effective March 31, 2003, a violation of the prostitution statute is a misdemeanor punishable by not more than 90 days in jail or a maximum $500.00 fine, or both.

CHAPTER 6

Specialized Procedures Governing Preliminary Examinations and Trials

6.7 Special Protections For Victims and Witnesses While Testifying

G. Taking, Using, and Disclosing Videorecorded Statements

Insert this new subsection at the end of Section 6.7 on p 304:

Effective March 31, 2003, 2002 PA 604 amended MCL 600.2163a, and 2002 PA 625 amended MCL 712A.17b, by revising and adding new provisions on the use and disclosure limitations of videorecorded statements of witnesses. The following details the salient revisions and additions.

A "videorecorded statement," which replaces the word "videotaped statement," specifically excludes videorecorded depositions from its definition, as follows:

> "'Videorecorded statement' means a witness's statement taken by a custodian of the videorecorded statement as provided in subsection (5). Videorecorded statement does not include a videorecorded deposition taken as provided in subsections (17) and (18)." MCL 600.2163a(1)(c) and MCL 712A.17b(1)(c).

A "custodian of the videorecorded statement" means any of the following:

- The family independence agency;
- Investigating law enforcement agency;
- Prosecuting attorney;
- Department of attorney general; or
- Another person designated under the county protocols established as required by MCL 722.628. MCL 600.2163a(1)(a) and MCL 712A.17b(1)(a).

A videorecorded statement is subject to a court protective order to protect the witness's privacy if the statement becomes part of the court record. MCL 600.2163a(11) and MCL 712A.17b(10).

Unless otherwise provided in MCL 600.2163a and MCL 712A.17b, a videorecorded statement must not be copied or reproduced in any manner and is exempt from disclosure under Michigan's Freedom of Information Act (FOIA) and under another statute or Michigan court rule governing discovery. However, the production or release of a transcript of the videorecorded statement is not prohibited. MCL 600.2163a(12) and MCL 712A.17b(11). In addition, if authorized by the prosecuting attorney in the county where the videorecorded statement was taken, "a videorecorded statement may be used for purposes of training the custodians of the videorecorded statement in that county on the forensic interview protocol implemented as required by [MCL 722.628]." MCL 600.2163a(9) and MCL 712A.17b(8).

A custodian of the videorecorded statement may release or consent to the release or use of a videorecorded statement or copies of the videorecorded statement to the following entities:

- Law enforcement agency;
- An agency authorized to prosecute the criminal case; and
- An entity that is part of the county protocols established under MCL 722.628. MCL 600.2163a(8) and MCL 712A.17b(7).

In prosecutions of adult offenders, the defense has the right to view and hear a videorecorded statement before the preliminary examination, and, upon request, the prosecutor must also provide the defense with reasonable access to the videorecorded statement at a reasonable time before the defendant's pretrial or trial. MCL 600.6123a(8). Additionally, to prepare for a court proceeding, the court may order that a copy of the videorecorded statement be given to the defense under protective conditions, "including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement." *Id*. In juvenile adjudications, the defense has the right to view and hear a videorecorded statement "at a reasonable time before it is offered into evidence." MCL 712A.17b(7). Additionally, to prepare for a court proceeding, the court may order that a copy of the videorecorded statement be given to the defense under protective conditions, "including, but not limited to, a prohibition on the copying, release, display, or circulation of the videorecorded statement." *Id*.

In prosecutions of adult offenders, a videorecorded statement may be used to support "a factual basis for a no contest plea or to supplement a guilty plea," in addition to its other statutorily authorized uses, i.e., pretrial proceedings (except preliminary examinations), impeachment purposes, and sentencing purposes.

MCL 600.6123a(6)(d). In juvenile proceedings, a videorecorded statement "shall be admitted at all proceedings except the adjudication stage." MCL 712A.17b(5).

The unauthorized release or consent to release of a videorecorded statement by an individual, including, but not limited to, a custodian of the videorecorded statement, the witness, or the witness's parent, guardian, guardian ad litem, or attorney is a misdemeanor punishable by imprisonment for not more than 93 days or a maximum $500.00 fine, or both. MCL 600.2163a(10), (20) and MCL 712A.17b(9), (19).

CHAPTER 7

General Evidence

7.15 Privileged Communications with Care Providers

E. Clergy

Delete the last paragraph in Section 7.15(E) and insert the following:

> This privilege is not abrogated under the Child Protection Law. See MCL 722.631, as amended by 2002 PA 693, effective March 1, 2003, which is quoted at Section 7.15(F), below.

F. Abrogation of Privileges in Cases Involving Suspected Child Abuse or Neglect

Replace the first two paragraphs (and their block quotations) in Section 7.15(F) with the following text:

> The Child Protection Law, at MCL 722.623(1), as amended by 2002 PA 693, effective March 1, 2003, imposes a new duty on clergy members to report suspected child abuse or neglect to the Family Independence Agency as follows:
>
> > "A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, certified social worker, social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the [Family Independence Agency]. Within 72 hours after making the oral report, the reporting person shall file a written report as required in this act."
>
> In conjunction with the foregoing reporting requirements, MCL 722.631, as amended by 2002 PA 693, effective March 1, 2003, now provides as follows:
>
> > "Any legally recognized privileged communication except that between attorney and client or that made to a member

of the clergy in his or her professional character in a confession or similarly confidential communication is abrogated and shall not constitute grounds for excusing a report otherwise required to be made or for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to [the Child Protection Law]. This section does not relieve a member of the clergy from reporting suspected child abuse or neglect under [MCL 722.623] if that member of the clergy receives information concerning suspected child abuse or child neglect while acting in any other capacity listed under [MCL 722.623]."

CHAPTER 8

Scientific Evidence

8.5 Blood Typing Evidence (Through Blood, Semen, and Other Body Fluids)

D. Electrophoresis

1. Blood

Insert the following language as a separate paragraph after the block quotation on p 419:

> For a recent case upholding the use of single-test serological electrophoresis to identify PGM (phosphoglucomutase) markers, see *People v Tanner*, ___ Mich App ___ (2003). In that case, the Court of Appeals, relying on *Gistover*, *supra* [*People v Gistover*, 189 Mich App 44 (1991)] and *Stoughton*, *supra* [*People v Stoughton*, 185 Mich App 219 (1990)], found no plain error by the trial court in not conducting a pretrial hearing to determine whether PGM blood typing complies with the *Davis-Frye** standard, since single-test serological electrophoresis has already been judicially recognized as generally accepted in the relevant scientific community and therefore not subject to *Davis-Frye*.

**People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 US App DC 46 (1923).

CHAPTER 8

Scientific Evidence

8.6 DNA Testing and Admissibility

H. Mitochondrial DNA (mtDNA) Testing

Insert the following at the end of Section 8.6(H) on p 424:

For an explanation of the difference between nuclear DNA and mtDNA, see *People v Holtzer*, ___ Mich App ___ (2003):

> "There are two types of DNA, nuclear DNA and mitochondrial DNA. Every cell of the body, except for red blood cells, contains both types of DNA. Nuclear DNA is the more commonly known variety and is found in the nucleus of the cell. One-half of an individual's nuclear DNA comes from each parent. Each nuclear DNA molecule consists of approximately three billion base pairs of nucleotides. Although over 99% of nuclear DNA is the same for all people, every person, except for identical twins, have unique differences in their nuclear DNA. It is this uniqueness which gives rise to its usefulness in forensic work.
>
> "Mitochondrial DNA, on the other hand, is found in small organelles called mitochondria, which are found in every cell floating in the protoplasm. The mitochondrial DNA is significantly smaller than a nuclear DNA molecule, containing only about 16,000 base pairs. It also differs from nuclear DNA in that mtDNA is inherited solely from the mother. Accordingly, it can be used to establish a maternal lineage. Another difference between nuclear DNA and mtDNA is that nuclear DNA is arranged in a long, double helix 'twisted ladder,' while mtDNA is circular, like a twisted rubber band. Furthermore, while each cell has only one nucleus, it has up to thousands of copies of mitochondria and each mitochondria has between two and ten copies of mtDNA. Thus, while nuclear DNA is significantly larger in size, mtDNA is present in significantly greater numbers. Additionally, mtDNA is more likely than nuclear DNA to survive in a dead cell. Thus, it is easier to recover useable mtDNA than nuclear DNA." *Id*. at ___.

In *Holtzer*, *supra*, the Court of Appeals held that the trial court did not err in finding that mtDNA testing satisfies the *Davis-Frye** rule by having achieved general acceptance among experts in the scientific community and in thus admitting the mtDNA evidence against defendant. In this felony-murder case, the mtDNA evidence consisted of three matches: one between the decedent's mtDNA and a hair found in defendant's bedroom, and two between defendant's mtDNA and a pubic hair and torso hair found at the crime scene. Additionally, the Court found that the trial court did not err in finding that the issue of whether laboratory procedures were followed presents an issue of weight, not admissibility, and that the mtDNA evidence was thus properly admitted into evidence. Similarly, the Court held that the trial court did not err in allowing use of the "counting method" of statistical analysis of DNA evidence, since statistical analysis goes to the weight, not admissibility, of the evidence.

**People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 App DC 46 (1923).

CHAPTER 8

Scientific Evidence

8.6 DNA Testing and Admissibility

J. DNA Statistical Interpretation Evidence

1. DNA Statistical Evidence Not Subject to Davis-Frye Test

Insert the following language after the first partial paragraph on p 430:

For a published Michigan appellate opinion holding that the use of the "counting method" of statistical analysis of mitochondrial DNA (mtDNA) testing is not subject to the *Davis-Frye** test and goes to the weight, not admissibility, of the evidence, see *People v Holtzer*, ___ Mich App ___ (2003). In this case, the Court of Appeals, in responding to defendant's arguments that the method of reporting the mtDNA results should have been subjected to *Davis-Frye*, that the mtDNA database was unreliable because it was too small, and that admission of the mtDNA evidence was highly prejudicial since his personal mtDNA sequence had not been previously seen in the database, stated the following:

> "We disagree. First, we note that defendant misstates the evidence when he claims that his mtDNA sequence had not been previously seen in the database. In fact, defendant's mtDNA sequence had been reported twice in a database of 1,657 people and the decedent's sequence was seen six times in the same database. Moreover, defendant's argument overlooks the fact that there was expert testimony that the counting method, which merely reports how many times a particular sequence has been seen before in the FBI database, is 'excessively conservative' and favors the suspect. In any event, this Court has held that the statistical analysis of DNA testing goes to the weight of the evidence, not its admissibility. . . . Accordingly, the trial court did not err in admitting this evidence." [Citations omitted.] *Id*. at ___.

**People v Davis*, 343 Mich 348 (1955), and *Frye v United States*, 54 App DC 46 (1923).

CHAPTER 8

Scientific Evidence

8.6 DNA Testing and Admissibility

K. An Indigent Defendant's Right to Appointment of DNA Expert Witness

Insert the following language at the end of subsection 8.6(K) on p 432:

For a case applying the principles enunciated in *People v Leonard*, *supra* [*People v Leonard*, 224 Mich App 569 (1997)], see *People v Tanner*, ___ Mich App ___ (2003). In that case, the Court of Appeals found that the trial court, in denying defendant's pre-trial request for the assistance of a court-appointed DNA and serology expert, violated her federal right to due process by causing her prejudice and making her receive a fundamentally unfair trial as a result of not having expert assistance. In *Tanner*, the only physical evidence linking defendant to the crime scene was a diluted blood stain found on the sink next to a knife behind the bar at Barney's Bar and Grill. According to the prosecution's expert witness, defendant's blood type (B) and PGM* subtype (2+, 1+) were the same as those on the diluted stain. The blood stain also matched the victim's blood type, but was inconsistent with the victim's PGM type and the blood type of the two other suspects. Because the blood evidence testimony provided by the prosecution's expert witnesses was of "crucial importance," the Court of Appeals reversed defendant's convictions and remanded the case for a new trial.

*"PGM" is the enzyme phosphoglucomutase.

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.3 Defenses to Civil Actions

A. Statutes of Limitations for Civil Actions

1. Limitations Periods

Insert the following language at the end of the first partial paragraph on p 485:

> Effective March 31, 2003, 2002 PA 715 amended MCL 600.5805 by adding subparagraph (4) which establishes a five-year limitations period for assault and battery causes of action in which there is, or was, a dating relationship* between the defendant and victim. This five-year limitations period applies to any cause of action arising on or after January 1, 2003 and to any cause of action in which the limitations period in MCL 600.5805(2) (domestic assault and battery with spouse or former spouse, resident or former resident, or child in common) has not already expired as of January 1, 2003.

*A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement. Dating relationship does not include a casual relationship or an ordinary fraternization between 2 individuals in a business or social context." MCL 600.5805(15).

Insert the following language at the end of the first full bulleted paragraph on p 485:

> Effective March 31, 2003, 2002 PA 715 amended MCL 600.5805 by adding subparagraph (12) which establishes a five-year limitations period for causes of action for injuries to a person or property of a domestic partner where the plaintiff has or has had a dating relationship with the defendant. This five-year limitations period applies to any cause of action arising on or after January 1, 2003 and to any cause of action in which the limitations period in MCL 600.5805(2) (domestic assault and battery with spouse or former spouse, resident or former resident, or child in common) has not already expired as of January 1, 2003.

Because of the added statutory subparagraphs and the redesignation of subsequent subparagraph numbers in MCL 600.5805, please note the following redesignated subparagraph numbers in the bulleted list on p 485:

- Libel or slander—one year, MCL 600.5805(9).
- Employment sex discrimination or harassment—three years, MCL 600.5805(10).

F "The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." MCL 600.5805(10).

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CHAPTER 6

Procedure and Sanctions

6.3 Criminal Penalties for Felony Traffic Offenses

Replace the second full paragraph in Section 6.3 on p 6-2 with the following language:

> Under the Michigan Penal Code, if the criminal penalty is not otherwise fixed by statute, a person convicted of a crime declared by the state of Michigan to be a felony "is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more $5,000.00, or both." MCL 750.503.*

*2002 PA 722 amended MCL 750.503 by modifying the maximum authorized fine from $2,000.00 to $5,000.00, effective March 31, 2003.